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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 108.

JETT BROTHERS DISTILLING CO., - *Plaintiff in Error,*

vs.

CITY OF CARROLLTON, - - - *Defendant in Error.*

REPLY BRIEF FOR PLAINTIFF IN ERROR.

MOTION TO DISMISS.

1. The defendant in error has moved to dismiss the writ of error, and the first ground for the motion is that no petition or application for a writ of error was filed.

The Statutes regulating the practice in this court, so far as we have been able to find, make no reference to a petition for writ of error. On the contrary, §997 of the United States Revised Statutes (§1653 United States Compiled Statutes) provides what shall be returned with the writ of error, and it does not specify a petition for the writ of error. And this court has held in many cases that a petition for writ of error forms no part of the record upon which this court acts (Leeper vs. Texas, 139 U. S. 467, citing preced-

ing decisions). One of the cases cited in Leeper vs. Texas is Butler vs. Gage, 138 U. S. 55, in which the court said:

> "It is essential to the exercise by this court of revisory jurisdiction over the final judgments or decrees of the courts of the states that the writ of error should be allowed either by a justice of this court, or by the proper judge of the State court, after ascertaining *by an examination of the record* that a question cognizable here was made and decided in the State court, and that such allowance was justified" (Page 55.).

And again in the same case the court said:

> "And it may be remarked in the outset, that the petition for a writ of error forms no part of the record upon which action here is taken" (Page 56).

The only reference we have been able to find to a petition for a writ of error in any regulation upon this subject is in the 35th rule of this court on the subject of "Assignment of Errors", which seems to imply that a petition for writ of error will be filed, although it makes no express requirement to that effect.

We submit, however, that manifestly, though it may be a practice to file a petition for a writ of error, it is not jurisdictional and not essential. And in the only cases we have been able to find on the subject, being two cases respectively from the 9th and 5th Circuit Courts of Appeal, it has been so held.

> Alaska, etc., Mining Co. v. Keating, 116 Fed. 564;
> Louisville Trust Co. v. Stockton, 72 Fed. 1.

2. As to the second ground of the motion to dismiss, to-wit, that the writ of error was not allowed within three months after the entry of the judgment complained of, this is simply based upon an error in the record, which has been or will be corrected before the case is heard. The ground of the motion is that the judgment was entered December 21, 1918, and the writ not allowed until April 19, 1919. Counsel note the fact that a petition for rehearing was filed and was not overruled until March 22, 1919; so that the writ was allowed within less than thirty days after the overruling of the petition for rehearing. But counsel say that the petition for rehearing itself was filed out of time and that there was no order extending the time for the filing of it. In fact, however, such an order was entered in the Court of Appeals of Kentucky on January 18, 1919, giving ten days' additional time to file the petition. And as the time otherwise would have expired, as shown by the brief of the defendant in error, on January 25, 1919, the extension of ten days carried the time to February 3, 1919; and the petition for rehearing was filed on January 29, 1919.

MERITS.

I.

We desire to reply to only one point in the brief for defendant in error on the merits.

Based on the case of *Western Union Telegraph Co.* v. *Missouri,* 190 U. S. 412, on writ of error to the Supreme Court of Missouri, counsel, as we understand them, contend that Jett Brothers had no right by answer in this suit of the City of Carrollton to plead as a defense that the assessment was void; and seem to contend that the attack upon the assessment could only have been made "*by a direct attack in equity.*"

This may be the law in Missouri in which that case arose and according to whose rules of practice it was governed; but it is not the law in Kentucky in which the present case arose.

In the first place, it will be observed that the Court of Appeals of Kentucky in the present case does not base its judgment upon any such proposition. The court does hold that Jett Brothers should have gone with their complaint before the Board of Valuation and Assessment itself; a proposition to which we have fully responded in our original brief. But the court does not intimate, so far as *judicial* procedure is concerned, that an attack in the courts could have been made upon the assessment by a "direct attack in equity," but not by an answer in the suit based upon the assessment. And we are very confident that

no authority to sustain such a proposition can be found among the decisions of the Court of Appeals of Kentucky; but all of its decisions, so far as we are familiar with them, show that a denial of the validity of an assessment can be shown just as well in a suit for a tax based upon the assessment as by a direct attack in equity.

In the first place, it should be remembered that by the Code of Practice in Kentucky an equitable defense can be made in a common law action. §113 of the Civil Code of Practice provides:

> "A pleading may contain statements of as many causes of action, legal or equitable, *and of as many matters of estoppel and of avoidance, legal or equitable,* total or partial; and may make as many traverses; and may present as many demurrers as there may be grounds for in behalf of the pleader" (Civil Code of Kentucky, §113, Subsection 2).

And §11 of the Code expressly recognizes that there may be both legal and equitable defenses to a common law action and provides the order in which they shall be tried, saying:

> "§11. *In an ordinary action properly commenced as such—*
> "3. If there be an issue which was not cognizable in chancery, and an issue which was exclusively cognizable in chancery, before the said day (August 1, 1851), the plaintiff may have the former issue tried before the latter is disposed of."

So far, therefore, as concerns the distinction between law and equity in making the attack upon the assessment, this is abolished by the Code of Practice in Kentucky, and the matter would seem to come down to a question of whether this attack on the assessment can be made by way of *defense* to an action to collect the tax based on the assessment, or whether the attack must be made by the taxpayer as a *plaintiff*. And an examination of the decisions of the Court of Appeals of Kentucky will show that absolutely no distinction along this line has been drawn by that court.

It is undoubtedly the law of Kentucky that a taxpayer cannot complain of the assessment by a duly authorized assessing tribunal simply on the ground that his property has been assessed too high. It is perfectly well settled that the assessment cannot be disregarded unless the assessing officer or tribunal has proceeded either (1) fraudulently or (2) according to an improper method. And this principle has been announced both in cases where the taxing authorities were the plaintiffs seeking to collect a tax, and where the taxpayer was the plaintiff seeking to enjoin the collection of a tax.

The very first case in which the principle is announced was a case in which the *Commonwealth was plaintiff* seeking to collect a tax and the taxpayer was a defendant, objecting to an assessment, viz.: Henderson Bridge Co. v. Commonwealth, 99 Ky. 623. In that case, as shown by the opinion of the court (Page

634), the defendant, Bridge Company, insisted that the assessment of its franchise was "too high and that the method of ascertainment adopted was erroneous." The court did not hold that it was not allowable to make this kind of a defense, but on the contrary entered into a very elaborate discussion of the Statute and pertinent authorities, by way of showing that the method pursued by the Board of Valuation and Assessment was a proper and lawful method. The opinion on this subject is very full, and in conclusion, by way of laying down a rule for future cases, the court said this:

> "It should be further said that the findings of this Board of Valuation and Assessment partake of a judicial nature. The defendant had its day in court. It did appear on notice before that Board and on evidence made its defense. And on this hearing that Board rendered its decision in fixing the value of the franchise of defendant, granted by authority of the State of Kentucky; and this finding, if not conclusive, is entitled to a very high degree of consideration and authority, and it should not be lightly set aside or disregarded by the courts, *unless the Board proceeded upon an erroneous principle or adopted an improper mode or manner of estimating the value of the franchise, or unless fraud is charged and shown to exist*" (Page 645).

As heretofore stated, the court in that case concluded that the Board had not proceeded according to an improper method, and, as no fraud was charged, the court upheld the assessment and held that the Commonwealth was entitled to recover the tax based

upon it. But so far from stating that it was not open to the defendant to make an attack upon the assessment by way of defense, the court held just the contrary. And this case has been often cited since as authority for the proposition laid down in it in the language heretofore quoted.

Thus in the case of *Hager* v. *American Surety Co.,* 121 Ky. 791, where the parties were reversed, that is to say, where the taxpayer was the plaintiff, the court, citing the Henderson Bridge case and quoting from it in the language quoted above, held in that case that the Board had adopted an erroneous method in fixing the value of the American Surety Company's franchise, and accordingly affirmed the judgment of the lower court which had enjoined the collection of a tax attempted to be imposed on the basis of the Board's assessment.

And in the case of *Louisville & Nashville Railroad Co.* v. *Greene,* 244 U. S. 522, the same rule was acted upon in a case which originated in the Federal District Court of Kentucky, the case being one which this court described as a case "seeking to restrain the taking of any steps toward enforcing State and local taxes upon the basis of an assessment of the franchise of the company * * * upon the ground that the assessment was unlawful and not in accordance with the Statute, was the result of an abuse of power," etc. (244 U. S. 525.)

Again there have been other cases in Kentucky where the taxing authorities have been the plaintiffs

seeking to collect taxes based upon an assessment claimed to be improper, and where the right of the defendant to attack or deny the validity of the assessment was treated as an unquestioned right.

Thus in *Louisville Tank Line* v. *Commonwealth,* 123 Ky. 81, the Commonwealth sued to recover a tax; and while the court in that case held that the assessment was valid, it said this:

> "That the assessing officers of the State took such other incidental steps as were necessary to perfect the assessment, is a fact that is presumed. Acting as they did under their oaths of office, every official act when completed raises a presumption in law that every incidental step necessary to its perfection has been taken by them. In a proceeding to recover the tax from a person or corporation assessed, if the issue is presented whether any such step was taken, in view of this presumption of law in favor of the completeness and correctness of the official action, the burden is shifted to the taxpayer to prove it was not taken. *Of course this presumption makes only a prima facie case for the State. It may be rebutted,* and may be sustained by further evidence if it is rebutted, and until it is rebutted the presumption of the law is sufficient to sustain the allegation of the petition of the State that such steps were taken" (Page 88).

It is also a perfectly well-settled principle of law in Kentucky, although the proposition is denied in some States, that a suit in equity will lie to enjoin the collection of an illegal tax, and that too, not where the suit is against an assessing officer to compel him to vacate or modify an assessment, but where it is

against a *collecting* officer in a suit to which the assessing officer is not even a party. This was the nature of the case of *Negley* v. *Henderson Bridge Co.*, 107 Ky. 414, which was a suit to enjoin a sheriff from collecting a tax based upon an unlawful assessment, in the course of which opinion the court said:

> "This Court has, in a number of cases, held that 'a mere opinion on the part of a taxpayer that an excessive valuation has been placed upon his property furnished no ground for enjoining the collection of taxes due to either the State or County' (Citing authorities). But the right to have an injunction to restrain the collection of an illegal and void tax has long been recognized in this State, upon the ground of the inadequacy of the remedy at law" (Page 418).

We are wholly unable to understand how it can be true that a taxpayer can enjoin a collecting officer from collecting a tax based on an illegal assessment, when the assessing officer is not even a party to the suit, but that if this same collecting officer has *power to sue* for the tax, and *does sue* for the tax, the defendant will then not be allowed to defend the suit on the ground of illegality of the tax. The two propositions are utterly inconsistent in principle.

As an illustration of the situation, take the facts of the case at bar. The levies upon which this action was based were made on the 7th and 13th days of July, 1916 (Rec. 6). No demand was made upon Jett Bros. for the payment of these taxes until long after the filing of this suit (Rec. 120, Answers of

witness 22 and 23). Jett Bros. supposed they had paid their taxes in the years 1907, 1908, etc. No demand was made upon them under the levies of 1916, except as the suit itself was a demand, and that was brought on August 15, 1916, just one month and two days after the levy of July 13th. It is indisputably true that if Jett Brothers had quickly gotten into court with a suit for injunction against the City of Carrollton to prevent the collection of this tax on the ground that it was illegal, the suit could have been maintained under the Kentucky authorities. Is it possible then, that because the City of Carrollton promptly brought suit itself to collect the tax based on the assessment, without even waiting to make a demand for payment, Jett Brothers cannot defend on the ground of the illegality of the assessment? If this should be true, then it becomes simply a race between the taxing authorities and the citizen as to which shall get to the court house first. And this is not the law in Kentucky.

We may further say that as a general proposition suits to collect taxes are not authorized by the law of Kentucky. Only in exceptional cases is a suit authorized to collect a State or a County tax. Municipalities are, however, frequently authorized to sue for municipal taxes. And the Court of Appeals of Kentucky has held in this line of cases that it is necessary for the plaintiff to allege the taking of every step necessary to show that the tax sought to be collected is a valid tax.

Thus in McArthur v. City of Dayton, 12 Ky. Opinions, 297, the Court of Appeals said:

> "In order to recover the amount of a tax imposed, where the statute gives the court jurisdiction it is essential, as has been often decided by this court, to aver and show a compliance with every duty necessary to the imposition of such a burden. The power of the general council to impose the tax must not only be alleged, but the manner in which it was imposed, viz.: by a vote of the general council in the manner required by the act, the assessment of the property, the notice of the meeting of the Board of Equalization—all such prerequisites must be alleged in order to show that the power conferred has been exercised in accordance with the charter authorizing it" (Citing Ormsby v. City of Louisville, 79 Ky. 197).

And what plaintiff must allege defendant can deny or avoid.

We submit, therefore, that according to the practice in Kentucky, it is permissible for a defendant, when sued for the collection of a tax based upon a certain assessment, to show that the assessment was illegal and the tax therefore also illegal and non-collectible. And as said before, the Court of Appeals in this very case does not deny that proposition.

II.

The question may be raised as to whether or not the point was made in the State court in proper time that the enforcement of the tax in question would be to deprive Jett Brothers of their property *without*

due process of law, contrary to the Federal Constitution, being the *second point* discussed in the original brief.

It does seem to be true that the record fails to show that this point was made prior to the filing of the petition for a rehearing; although this petition did distinctly make it (Rec. 130, 135). The *facts* upon which the proposition is based are very clearly and distinctly shown in the record of the case in the Circuit Court. It is specifically pleaded in paragraph 18 of the answer that prior to July 7, 1916 (the date of the levies in question), all of the whiskey, for the tax on which plaintiff sues, had been removed from the custody of defendant "from four months to ten years prior to the making of said alleged levies of the tax" (Rec. 70). And the same fact is again pleaded in paragraph 20, coupled with the statement that to require plaintiff to pay this tax levied after the whiskey had been removed from its possession "is both inequitable and unconscionable" (Rec. 71, 72). It is true, however, that neither the 18th nor the 20th paragraphs, just mentioned, specifically refers to the Constitution of the United States, although paragraph 19, which refers to the *inequality* of the assessments as between this whiskey and other property in Carrollton, does specifically refer to and rely upon the Federal Constitution.

The *facts* to support the point, to-wit, that the collection of the tax would be to deprive defendant of its property without due process of law, contrary

to the Federal Constitution, having been thus specifically pleaded, the record does show, as said above, that in a petition for a rehearing the point was specifically made that to collect this tax would be to deprive defendant of its property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Federal Constitution (Rec. 135).

We are aware that this court has held as a general proposition, that it is too late to raise a Federal question for the first time in a petition for a rehearing, although this is not an absolute rule without exception, for the court has also held that if the State court considers and decides the Federal question, although raised for the first time by a petition for rehearing, this is sufficient to give this court jurisdiction (Leigh v. Green, 193 U. S. 79; McKay v. Kalyton, 204 U. S. 458).

It seems to us it should be sufficient to give this court jurisdiction if it be shown that the State court *must have decided* the Federal question raised by the petition for rehearing, even though it does not expressly say so. This court has long since, and in many cases, settled the proposition that where a Federal question is distinctly raised in the court of original jurisdiction, and where the highest court of the State must have decided it in order to dispose of the case as it did, although not expressly saying so, this is sufficient to give jurisdiction to this court (Steines v. Franklin County, 14 Wall. 15, 20, 21). And so it seems to us, if it appears that, although a particular

Federal question was raised for the first time on a petition for a rehearing, yet the State court *must have decided it* in overruling the petition for a rehearing, even though it may not expressly say so, this should be sufficient to give this court jurisdiction.

We have endeavored to find from the opinions of this court, establishing the general proposition that it is too late to raise a Federal question for the first time by a petition for a rehearing, what is the basis or reason of that ruling. And the only opinion we have been able to find giving a reason for the ruling is in *Texas & Pacific Ry. Co.* v. *Southern Pacific Co.*, 137 U. S. 48, in which the court by Mr. Chief Justice Fuller, after stating the Federal questions sought to be raised in this case, says:

> "But it does not appear that either of these propositions was presented to the trial court in any way, or advanced in the Supreme Court, until urged in the petition for a rehearing. The title, right, privilege or immunity was not specially set up or claimed at the proper time and in the proper way. It is true that under the law of Louisiana a judgment of the Supreme Court does not become final until after six judicial days from the rendering of the judgment have elapsed, within which time a dissatisfied party may apply for a new hearing of the cause, *but it does not follow that new grounds for decision will be allowed to be presented, or will be considered on such application, and the general rule is otherwise.*" (p. 53.)

As said above, this is the only reason we have been able to find in the opinions of this court for the rule

that the raising of a Federal question for the first time in a petition for a rehearing is too late; the reason being that the general rule is that a court will not consider *"new grounds for decision"* presented for the first time by a petition for a rehearing, and that in the case before the court it did not appear that the rule governing the practice of the court, whose decision was then under consideration, was other than the general rule. Therefore it did not necessarily appear that the State court had considered the Federal question at all.

In Kentucky, however, it certainly is the rule that a new ground of decision may be presented for the first time by a petition for a rehearing. Of course the *facts* upon which this new ground for decision is based must appear in the record as made up in the lower court; but if these facts do thus appear, then, even though a party may fail to make a particular point in the argument before the Court of Appeals, yet if he makes his point by a petition for a rehearing, the court does consider it, and if in the opinion of the Court of Appeals the point is well taken, the court will set aside its former ruling and make a different ruling.

We cannot quote to the court any statute or any written rule of court on this subject, but the opinions of the Court of Appeals show that such is the practice of the court beyond any possible question.

The latest case we call to mind illustrating this practice is *Elsey* v. *Peoples Bank of Bardwell,* 168

Ky. 701, quite a late case, where this practice of the court is very clearly shown. The case was one involving a principle of law applicable to negotiable instruments. The question was whether or not a surety on a note which had been discounted by the bank had been released from liability by conduct of the bank. The lower court held that the surety was not released and gave judgment for the bank on the note, whereupon the surety appealed. The Court of Appeals in an opinion reported in 166 Ky. 386 held that the surety was released and, accordingly, reversed the judgment, which had been in favor of the bank. On a petition for a rehearing, the bank, for the first time, called the court's attention to what is known in Kentucky as the "Negotiable Instruments Act," and insisted that according to the provisions of that Act the surety was not released, and the court, upon a consideration of the petition for a rehearing, concluded that this point was well taken and, accordingly, set aside its order of reversal and entered an order affirming the judgment of the lower court in favor of the bank. The situation and the way in which the case was presented are clearly shown by the first two paragraphs of the opinion above mentioned, as follows:

> "The facts of the case may be found in 166 Ky. 386.
>
> "The case was prepared and tried in the Circuit Court, and argued and decided upon appeal to this Court, upon the theory that the note was not a negotiable instrument, or was not affected

> by the Negotiable Instrument law of this State. *Neither party mentioned that Act in his brief;* and in their petition for a rehearing, counsel for appellee concede that the case was correctly decided in this court under the law of this State which antedated the Negotiable Instruments law.
>
> "*For the first time, however, it is suggested in the petition for a rehearing* that under the Negotiable Instruments law, J. L. Elsey, although he was a surety, is primarily liable upon the note sued on, and has not been discharged from that liability in any one of the five ways provided in Section 119 of the Act." (p. 702.)

The court then entered upon a consideration of the Negotiable Instruments Act, and concluded that under the provisions of that Act the surety had not been discharged, although the court in its first opinion had held that he had been. And in conclusion the court said:

> "The petition for a rehearing is granted; the former opinion is withdrawn and the judgment of the circuit court is affirmed" (p. 704).

We could doubtless find many cases of this kind among the opinions of the Court of Appeals of Kentucky, but it is not necessary to multiply cases on the subject. This one case, a late case, shows the practice so clearly that it is not necessary to multiply examples.

In other words, in conclusion, it is true in Kentucky that the Court of Appeals does consider new grounds for decision raised for the first time in a petition for a rehearing, and, therefore, when the

record shows that in a petition for a rehearing filed in that court, a certain Federal question based on facts shown by the record is specifically raised, it is the duty of the court to consider it, and if an order overruling the petition could not have been made without deciding that point adversely to the petitioner, then the record does show that the point was considered and decided by the State court, and ground is laid for the jurisdiction of this court.

As a matter of precaution, we should possibly add that by express provision of the Civil Code of Practice of Kentucky a judgment of the Court of Appeals does not become final until the expiration of thirty days from the rendering of a decision, and within this time, or within such extended time as the court may grant, a party has the absolute right to file a petition for rehearing. The quotations from the Code and rules of court made in the brief of counsel for defendant in error sufficiently show this without the necessity of quoting the Statutes and rules here.

Respectfully submitted,

HELM BRUCE,

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Attorneys for Plaintiff in Error.

Nov. 11, 1919.

ADDENDUM.

Since the preparation of the reply brief, and bearing upon the question of petitions for rehearing in the Court of Appeals of Kentucky, we have recalled that on March 15, 1884, the Court of Appeals adopted a rule as follows:

> "Petitions for rehearing must clearly show from the record that some question duly submitted by counsel, and decisive of the case, has been overlooked by the Court, *or that the decision is in conflict with a statute, or with a controlling decision to which the attention of the Court was not drawn, through neglect or inadvertence of counsel.* Any petition violative of this rule will not be presented to be filed, and if filed will be stricken from the record." (Prefix to 81 Ky. p. xiv. Our italics.)

This rule did not broaden, but, on the other hand, was intended to restrict, the right of petitioning for rehearing as the right had previously existed. It recognized the right of a party to file a petition for a rehearing and make the point, for example, that there was a statute controlling the matter *to which the Court's attention had not been called;* but it required counsel to admit that this was "through neglect or inadvertence of counsel." The main purpose of the rule was to prevent parties from *re-arguing questions which had been argued before,* and which the Court had considered, and to confine petitions for rehearing to points which had been overlooked,

(1) either by the Court in considering points which had been submitted, or (2) by counsel in failing to make points. The rule was never rigidly enforced. So far as concerned, points which had not been made "through neglect or inadvertence of counsel," it was easy for counsel to say that the matter had simply escaped their attention. And, as to the balance of the rule, counsel simply disregarded i t, and continued to file petitions for rehearing re-arguing matters theretofore argued. And in the course of a few years the rule was dropped; we do not recall just when. It is not a part of the rules today and it has not been for many years. It shows, however, that even under a rule manifestly intended to *restrict* the right to file petitions for rehearing, the Court recognized the right to make a new point not theretofore called to the attention of the Court. And as it expressly permitted a new point to be made, based upon *a statute* which had not been called to the Court's attention, of course the Court would have allowed a point to be made based upon the *Constitution,* either of the State or of the United States. In fact, the word "statute" in the rule would doubtless embrace a constitution.

Many years later, to-wit, in 1904, Judge O'Rear, then a member of the Court of Appeals, addressed the Bar Association of Kentucky on the subject of "The Petition for Rehearing, its Uses and Abuses," which is reported in the printed proceedings of the Kentucky State Bar Association for the year 1904. The above quoted rule of 1884 had then been re-

scinded or dropped from the rules of the Court, but Judge O'Rear in this address, calling attention to the old rule, strongly urged that its spirit ought to be observed by the bar, insisting that the Court was uselessly burdened by petitions for rehearing, simply re-arguing questions that had been argued and decided, and that such petitions ought properly to be *confined to new points.* In the course of his address he said this:

> "I submit to you that if the rule of 1834" (misprint for 1884) "were lived up to by the bar and enforced by the Court, every just and reasonable requirement of the office of that pleading would be met and subserved, *and we would escape having to try again cases which have been tried and decided.* Perhaps decided wrongly. Judges, after all, are but lawyers with a title, and if lawyers could be so frequently wrong, of course when they get to be judges, they will occasionally get wrong. But even though decided wrongly, they have been decided by that tribunal established in the experience of your people and in the form best calculated to bring the best results. In the interest of the State and the law, and the dignity of the Court, I appeal to you for an observance of that old rule. The petition ought not to be filed *unless it presents a new point* that is decisive of the case. The Court ought not to sit there, engaging in the considerations and writing of opinions for academical purposes. There is so much real practical need of every minute of the Court's time and every particle of the Court's energies. It is not only a useless waste, but a sinful waste, of the powers appointed by the law for the dispatch of public business. *I lay this matter upon the consciences and intelligence of the representatives of the Bar*

of Kentucky." (Proceedings of Kentucky State Bar Association, for the year 1904, p. 45. Our italics.)

Not only is the making of a new point on a petition for rehearing *permissible* in the Court of Appeals of Kentucky, but the bar has been urged to *confine their petitions to new points,* and not to insist upon re-arguing old ones.

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December 6, 1919.

FILED
NOV 18 1919
JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1919. No. 108.

JETT BROS. DISTILLING COMPANY,
Plaintiff in Error,

versus

CITY OF CARROLLTON,
Defendant in Error.

In Error to the Court of Appeals of Kentucky.

Brief for Defendant in Error.

A. E. STRICKLETT,
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October Term, 1918. No. 108.

JETT BROS. DISTILLING COMPANY,
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vs.

CITY OF CARROLLTON,
Defendant in Error.

In Error to the Court of Appeals of Kentucky.

PART I.

Motion to Dismiss Writ of Error.

Now comes the City of Carrollton, the defendant in rror, and moves that the writ of error be dismissed on he following grounds:

First. No petition or application for a writ of error erein was filed by The Jett Bros. Distilling Company, the Court of Appeals of Kentucky, prior to or at the me the assignment of errors was filed, or at all.

Second. That at the time the writ of error was issued erein, to-wit, April 19, 1918, more than three months as elapsed after the entry of the judgment com-lained of.

ARGUMENT ON MOTION TO DISMISS.

The record in this case discloses that the writ of error was issued without a petition or application therefor having been made. The Act of September 6, 1916, Sec. 1228 of the Compiled Statutes of the United States, provides as follows:

> "No writ of error, appeal or writ of *certiorari*, intended to bring up any cause for review by the Supreme Court shall be allowed or entertained unless duly applied for within three months after entry of the judgment or decree complained of."

Rule 35 of this court provides:

> "Where an appeal or writ of error is taken from the district court direct to this court under Sec. 238 of an Act entitled 'An Act to codify, revise and amend the laws relating to the judiciary,' approved March 3, 1911, Chap. 231, the plaintiff in error or appellant shall file with the clerk of the court below with his petition for the writ of error or appeal, an assignment of errors. * * *."

Sec. 1662 of the Compiled Statutes (U. S., 1916) provides:

> "Writs of error from the Supreme Court to a state court in cases authorized by law shall be issued in the same manner and under the same regulations and shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of United States."

herefore, the same proceeding must be followed in aining a writ of error from the Supreme Court of the ted States to a state court, as is required in obtaining rit of error from the Supreme Court to the inferior rts of the United States. The statutes provide that writ of error shall be "duly applied for," and the les of this Court provide that the plaintiff in error * * shall file his petition accompanied with an assignnt of errors, with the clerk in the court below. hether the filing of a petition in the court below for writ of error is a condition precedent to removing a se from the State court to the Federal Supreme Court, a matter that addresses itself to this Court. Suffice to say, that the record in this case shows an absence of e petition or any formal application for the writ of ror.

2. At the time the writ of error was issued herein, writ, April 19, 1918, more than three months had elapsed ter the entry of the judgment complained of.

The record in this case shows that the judgment comained of was rendered on the 21st day of December, 17. Sec. 760 of the Code of Practice of the State of entucky provides:

> "The Court of Appeals may make rules for the convenient dispatch of business * * * and the manner and time of presenting * * * petitions for rehearing * * * provided,
>
> "That no mandate shall issue, nor decision become final, until after thirty days, excluding Sunday, from the day on which the decision is rendered, unless the court * * * otherwise directs."

Rule 13, Sub-Section 1 of the Court of Appeals of Kentucky, is as follows:

> "Petitions for Rehearing—When May be Filed in Clerk's Office. When time is extended to file a petition for rehearing, and the time expires during vacation, or where the court adjourns before the time for filing a petition for rehearing has expired, the filing of the petition with the clerk in the clerk's office within the time shall be held sufficient. The clerk, however, has no right to extend the time for filing, and this can only be done by an order from one of the judges."

Sub-Section 3 of Rule 13 of the Rules of the Court of Appeals of Kentucky, provides:

> "No extension of time for filing a petition for rehearing shall be granted except on the affidavit or statement of the attorney or client, stating sufficient cause therefor."

Excluding Sundays, from December 21, 1917, and excluding the day on which the judgment was rendered, the thirty days will have expired and the judgment of the Court of Appeals become final, on January 25, 1918. The record does not show that the time for filing the petition for rehearing was extended, which under the rules could be done only by order from one of the judges. The petition for rehearing in this case was filed on the 29th day of January, 1918. The writ of error bringing the case to this court was issued on the 19th day of April, 1918, more than three months after the judgment complained of had been rendered. Application for a writ of error to bring up any cause for review by the Supreme Court must be within three months after entry of the judg

t or decree complained of. (Act of Sept. 6, 1916, *ra.*)

Under the provisions of the Code of Practice of the ate of Kentucky, and the Rules of the Court of Ap-als, the judgment had become final when the petition r rehearing was filed, and although that court appar-tly considered the petition for rehearing, it did not ve the effect of suspending the judgment.

In the case of *Conboy* v. *First National Bank of Jersey ity*, 203 U. S., 141, 145, this court had under considera-on an appeal very similar to the one here presented. he court said:

> "No appeal lies from orders denying petitions for rehearing, which are addressed to the discretion of the court and designed to afford it an opportunity to correct its own errors. *Brockett* v. *Brockett*, 2 How., 238; *Wylie* v. *Coxe*, 14 How., 1. Appellant might have made his application for rehearing and had it determined within the thirty days, and still have had time to take his appeal. But he let the thirty days expire, as it did February 22, 1905. The right of appeal had then been lost and appellant could not reinvest himself with that right by filing a petition for rehearing.
>
> "The cases cited for appellant, in which it was held that an application for a rehearing, made before the time for appeal had expired, suspended the running of the period for taking an appeal, are not applicable when that period had already expired. 'When the time for taking an appeal has expired, it can not be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter.' *Credit Company, Limited*, v. *Arkansas Central Railway Company*, 128 U. S., 258, 261."

It is apparent that the petition for rehearing filed by the plaintiff in error in this case, was not within the time provided by law, or the rules of the Court of Appeals. The writ of error was issued nearly four months after the judgment complained of was rendered. Therefore, for the reasons above assigned, the motion to dismiss the writ of error should be sustained.

PART II.

BRIEF FOR DEFENDANT IN ERROR.

Statement of the Case.

Jett Bros. Distilling Company is a corporation under the laws of the Commonwealth of Kentucky, and maintains in the City of Carrollton, Kentucky, a warehouse in which was kept in storage distilled spirits.

The defendant in error, the City of Carrollton, is a municipal corporation of the fourth class under the laws of the State of Kentucky. By this proceeding, the plaintiff in error seeks to have this court review a judgment of the Court of Appeals of Kentucky, holding it liable for the payment of taxes to the City of Carrollton on distilled spirits which were stored in its warehouse during the years from 1907 to 1916, both inclusive, and which were from time to time withdrawn from said warehouse between the first day of May, 1911, and the first day of January, 1917. (178 Ky., 561.)

All property located within the City of Carrollton was for the years in question, subject to municipal taxation, unless specifically exempt by the Constitution of Kentucky, and it was the duty of all persons holding or

ning property within said municipality, to list same r taxation and pay the taxes thereon. (Sections 170 d 174, Constitution of Kentucky.)

The General Council of the City of Carrollton for each ar mentioned, by ordinance levied a tax of seventy-five nts on each One Hundred Dollars of taxable property ithin its corporate limits. The ordinances levying a tax r each of the years in question were defective, and each rdinance was separately amended July 7, 1916. The istilled spirits stored in the plaintiff's warehouse were ssessed for taxation by the city authorities under Sec. 535 of the Kentucky Statutes, which was a part of the harter of cities of the fourth class, and which is as fol-ows:

> "Property valued as of the first of April. All property taxed according to value shall be valued as of the first day of April each year, and the person owning the same or holding the same in the right of another, on that day, shall list it with the assessor and remain bound for and pay the tax, notwithstanding he may have sold or parted with the property."

The assessment made by the city assessor how-ver, was void, as the city authorities had no power hatever to value or assess distilled spirits for the urpose of municipal taxation. The State Board f Valuation and Assessment under Section 4105 to 4114 of the Kentucky Statutes, was vested with au-hority to assess for purposes of taxation, distilled spir-ts stored in warehouses, from reports filed with the State uditor. The assessments thus made were certified by he Auditor to the County Clerk of Carroll County, who n turn certified the same to the Tax Collector of the City

of Carrollton, who proceeded to collect the taxes due on the assessments made for each of the years mentioned. Sections 4105 to 4114, are as follows:

"4105. (1) Owner of Warehouse to Report to Auditor. Every owner or proprietor of a distillery bonded warehouse in which distilled spirits are stored shall, between the first dayof September and the first day of October of each year, report to the auditor of public accounts, in writing, sworn to by the person making the report; or, if the owner or proprietor of such warehouse be a corporation, the report shall be made and sworn to by its principal officer or manager in charge. Such report shall show the quantity and kind of spirits in such warehouse on the first day of September in the year the statement is required to be made, the dates when made, the county, city, town or taxing district in which the warehouse is situated; whether or not the United States Government tax has been paid thereon, if not, the date of expiration of the bonded period; the fair cash value of the spirits estimated at the price it would bring at a fair voluntary sale, and such other facts pertaining to such spirits as the auditor may require.

"4106 (2) Reports—Auditor to Submit to Board of Valuation—Record to be Kept. That the said reports shall be, by the auditor of public accounts, submitted to a board of valuation and assessment composed of the auditor of public accounts, the treasurer of the State and the Secretary of State, who are hereby constituted such board, and said board shall fix the values for the purpose of taxation under this act, and assess the same accordingly, and shall keep a record of their valuations and assessments, in a book provided for that purpose, and said record shall be evidence in all courts of the proceedings of said board.

"4107 (3) Board to Assess—Notice to Owners—Hearing. The auditor of public accounts shall file such reports with the board, which shall assess the spirits for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale. The board shall at once notify the owner or proprietor of the warehouse of the amount so fixed; and such owner or proprietor shall have thirty days, after receiving the notice, to go before the board and ask a change of the valuation, and may introduce evidence; and the board may make such changes as it may deem proper. The action of the board shall be final.

"4108 (4) Values Certified to Auditor and Clerks. Immediately after finally fixing such values, the board shall certify to the auditor of public accounts the value of the spirits as assessed for State tax, and said officer shall certify to the said county clerk of the respective counties the amount liable for county, city, town or district taxation, and the date when the bonded period will expire on such spirits. The report shall be by the county clerk filed in his office, and by him certified to the proper collecting officer of the county, city, town or taxing district for collection.

"4109 (5) Custodian Liable for Tax. Any person or corporation having the custody of such spirits on the first day of September in the year the assessment is made shall be liable for all taxes due thereon, together with all interest and penalties which may accrue; and any warehouseman or custodian of such spirits, who shall pay the taxes, interest or penalties on such spirits, shall have a lien thereon for the amount so paid, with legal interest from day of payment.

"4110 (6) Taxes — When Due — Interest. Taxes on distilled spirits which may be assessed

while in a bonded warehouse, and on which the United States Government tax has not been paid, or will not become due before the first day of March after the assessment, shall be due on the second day of January, May and September next after the said Government tax become due or be paid or when the spirits are removed from the warehouse; and the taxes on each year's assessment shall bear legal interest until paid.

"4111 (7) Owner or Proprietor to Report and Pay Tax. Every owner or proprietor of a bonded warehouse in which distilled spirits may be stored, as contemplated in the preceding section, shall, on the first day of January, May and September next after said Government tax shall have been paid, become due, or be removed from the warehouse, make and transmit to the auditor of public accounts and the clerk of the county court in which the spirits may have been at the time of the assessment, a statement sworn to by the person whose duty it is to make the report, showing the quantity of spirits on which the Government tax has been paid or has become due, and what spirits have been removed from the warehouse during the preceeding four months, the years in which such spirits were assessed for taxation, and the county, city, town or taxing district in which the warehouse is situated in which the spirits were stored at the time of the assessment, and shall, at the same time, pay all taxes and interests on such spirits due the State, county, taxing district, city, or town to the officers entitled to receive the same. The report herein required shall be made by the owner or proprietor of such bonded warehouse whether any spirits are stored in such warehouse or not at the time the report is due.

"4112 (8) Penalty for Failure to Pay Tax. On the failure of any owner or proprietor of any

such warehouse to pay the taxes and interests within fifteen days after the same have become due, he shall be deemed delinquent, and a penalty of eight per cent. on each year's taxes due on the spirits shall attach, and the officer authorized to collect such taxes shall at once cause such proceeding to be instituted for the collection of such taxes, with such interest and penalties as may be provided by law for the collection of other delinquent taxes.

"4113 (9) Board May Assess if Report not Made. If any warehouseman or custodian of such spirits fail to make the report as required in section 1 of this article, the board shall ascertain the necessary facts therein required to be reported and for this purpose shall have access to the records of such warehouseman or custodian, and the same shall be assessed and taxes collected thereon, with interest and penalties, as though regularly reported.

"4114 (10) Penalty for Failure to Report —Making False One. Any person whose duty it is to make the reports as herein required, who shall fail to do so, shall be deemed guilty of a misdemeanor and, on conviction, be fined not less than one hundred nor more than five hundred dollars; and any such person who shall wilfully fail to make such report, with intent to evade payment of taxes, shall be guilty of a misdemeanor and, on conviction be fined not less than five hundred dollars nor more than one thousand dollars; and any person who shall make a false report, with intent to evade the payment of taxes, shall be deemed guilty of false swearing, and, on conviction, be punished as prescribed by law for such crimes."

Under the laws of Kentucky, taxes on whiskey in bonded warehouses, whether for State, County or munic-

ipal purposes, are payable when the Government tax is paid, or when the whiskey is withdrawn from the warehouse. The whiskey on which the taxes are due and involved in this case, was withdrawn from the warehouse of plaintiff in error, between May first, 1911, and January first, 1916, on which the municipal taxes at once became due and payable. The Jett Bros. Distilling Company declining to pay the taxes due on the valuation of distilled spirits, as fixed by the State Board of Valuation and Assessment, suit was instituted in the Carroll Circuit Court, which adjudged that the City of Carrollton was entitled to recover the taxes in question, subject to a credit of the taxes actually paid on the assessment as fixed by the City Assessor. From this judgment an appeal was prosecuted to the Court of Appeals, and that court affirmed the judgment of the lower court.

Argument.

I.

The Court of Appeals of Kentucky has frequently been called upon to construe the sections of the statutes, *supra*.

In the case of *Commonwealth of Kentucky* v. *The E. H. Taylor Co.*, 101 Ky., 325, the statutes were held to be constitutional. In the cases of *City of Louisville* v. *Louisville Public Warehouse Co.*, 107 Ky., 184, and *Krauer* v. *City of Henderson*, 155 Ky., 633, the Court of Appeals held that the assessment of distilled spirits should be made only by the State Board of Valuation and Assessment, and a public warehouse company is not liable to a municipality for taxes upon an assessment made by local taxing officers.

Whiskey in bond is not liable to any of the processes of the State courts, and there is no power to subject it to the demands of the state or any subdivision thereof for taxes until the Federal Government's lien for taxes has been fully discharged.

Plaintiff in error seems to be imbued with the idea that its obligation to the City of Carrollton had been fully discharged when it paid taxes on the valuation of the whiskey, as fixed by the city authorities. That assessment was absolutely void. But the tax paid by plaintiff in error was credited on the taxes which became due under the legal assessment, and therefore plaintiff is not prejudiced by reason of payment thus made.

The fact that the ordinance levying the tax for the several years, was amended so as to include all species of property on which the municipality was entitled to collect taxes, for its governmental purposes, does not present a Federal question.

All property within the municipality is subject to taxation for municipal purposes. If, for instance, the property on which the tax is sought to be collected, was stock or bonds, and had, prior to the institution of the suit, been sold and transferred by the owner or holder, he nevertheless would be liable to the payment of the tax for the period during which he was the holder or owner, notwithstanding the fact that he had disposed of it before the institution of the action to enforce the collection of the tax due.

In the instant case, the plaintiff in error contends that it is not liable for the taxes due on the distilled spirits removed from its warehouse between the first day of May, 1911, and the first day of January, 1916, because the whiskey at the time had been removed from the ware-

house and was no longer its property or in its possession or under its control, and that if plaintiff in error was required to pay taxes on this whiskey at the time, it would have no possible means of protecting itself. It is nevertheless liable for the taxes due on the whiskey, as it was its duty under the law to pay the municipal taxes thereon. But this question is not one for this Court, as it does not present a Federal question.

A very similar contention was made in the case of *Thompson* v. *Kentucky*, 209 U. S., 340. In that case the contention was made that Thompson paid the taxes demanded of him under a different construction of the statute, receiving a receipt from the State, and that it was estopped to make further demands. He contended that he had made the report required by law and paid all taxes demanded of him, and having discharged his legal obligation as he supposed, he delivered the property to its owner, and lost the lien which the statute gives him, which constituted the legal justification as he contended of the charge upon him, and he is now subjected to liability for interest and penalties for which he has no security or power to enforce reimbursement.

This Court said:

> "To the contention that the warehouseman has lost his lien through the construction put upon the act by the State's fiscal officers, and that the State was therefore estopped from collecting the interest, the court replied: 'It may be true that this will work a hardship upon the distiller, but it was his duty, under the law, to pay the taxes and the accrued interest, and we can not, in his behalf, waive the time-honored and conclusive presumption that he knew the law; and especially is this true since 1897, when the case of *Commonwealth* v. *Taylor* was de-

cided, thus establishing beyond all question that taxes on whiskey in bond bore interest on the assessments made during the bonded period. Saying this, however, it is elementary that the State is not estopped by the laches of its officers.'

"But from this situation this court can not give relief. Due process of law does not assure to a taxpayer the interpretation of laws by the executive officers of a State as against their interpretation by the courts of the State or relief from the consequences of a misinterpretation by either."

It will be observed that the plaintiff in error in this case did not even plead that the payment of taxes to the City of Carrollton under the levies at issue, deprived it of its property without due process of law, in violation of the Constitution of Kentucky, or of the Fourteenth Amendment to the Constitution of the United States, but this question was raised for the first time in its petition for rehearing in the Court of Appeals.

II.

Plaintiff in error contends that property in the City of Carrollton was assessed for the years in question for purposes of taxation for municipal purposes, by the City's constituted authorities, at not over thirty per cent. of the fair cash value; and that the distilled spirits on which the city is seeking to collect the taxes involved in this case, were assessed at one hundred per cent. of their cash value; and that this assessment was "unjust, unequitable, and in violation of the rights vested in this defendant by the Constitution of the State of Kentucky," and "in violation of the Fourteenth Amendment

of the Constitution of the United States." (Page 71 of Record.) The property within the City of Carrollton other than distilled spirits is assessed by its officials authorized by the charter of cities of its class in the State of Kentucky. The Board of Valuation and Assessment is composed of state officials. The assessments on the whiskey on which the City of Carrollton is seeking to recover taxes in this proceeding, were made from year to year by the State Board of Valuation and Assessment, and on which the plaintiff in error paid the State and County taxes as the same became due and payable under the laws of the Commonwealth of Kentucky. No complaint was made by plaintiff of the alleged discriminatory valuation of its property, although it received notice from the State Board of Valuation and Assessment from time to time, as the assessments were made. Plaintiff acquiesced in the assessment and paid the taxes to the State and to the County thereon for the various years in question. The law under which these assessments were made by the State Board of Valuation and Assessment, provides a complete remedy to the tax payer where unfair valuation is made, or where valuation or assessment made by the Board works discrimination.

The case of *Greene* v. *Louisville & Interurban Railroad Co.*, 244 U. S., 499, decided by this court and cited by counsel, is not in point. In that case, the State Board of Valuation and Assessment fixed the value, and the taxpayer appeared and protested against the assessment as being excessive as compared with valuation of other property in the state for purposes of taxation; the Board refusing to change the assessment, thereupon, the taxpayer instituted a proceeding in equity in the United

...ted District Court for the Eastern District of Kentucky, to enjoin the collection of taxes by reason of the unfair and discriminatory valuation fixed by the Board. In that case, the taxpayer attacked the action of the Board in a direct proceeding.

In this case, no complaint was made to the Board of Valuation and Assessment, of the assessment by it made, and the plaintiff in error is collaterally attacking the action of the State Board, whose findings are *quasi*-judicial.

In a companion case of the Louisville & Interurban case just referred to, to-wit, *Louisville & Nashville Railroad Company* v. *Greene*, 244 U. S., 522, 536, this court said:

> "The finding of an official body such as the Boad of Valuation and Assessment, made—as was the case here—after a hearing and upon notice to the taxpayer, are *quasi*-judicial in their character, and are not to be set aside or disregarded by the courts unless it is made to appear that the body proceeded upon an erroneous principle or adopted an improper mode of estimating the value of the franchise, or unless fraud appears. *Pittsburgh, etc., Railway Co.* v. *Backus*, 154 U. S., 421, 435, 436; *Chicago, Burlington & Quincy Ry. Co.* v. *Babcock*, 204 U. S., 585, 596. In this case there is no showing of fraud, the contention being that the Board departed from the mode prescribed by the statute. If they did this, or if they proceeded in disregard of rights secured to the taxpayer by the state or federal constitution, of course they proceeded upon an erroneous principle. *Henderson Bridge Co.* v. *Commonwealth*, 99 Kentucky, 623, 645; *Hager* v. *American Surety Co.*, 121 Kentucky, 791, 800."

There is no showing in this record that the plaintiff in error has been deprived of any right. The State Board of Valuation and Assessment was open to them to make any complaint against the assessment in question. The assessments were made from reports made to the Auditor by the plaintiff in error. It accepted the valuation of the property as made by the Board, and paid the State and County taxes thereon.

The Court of Appeals in considering this case, 178 Ky. 561, 566, said:

> "It is further asserted that the recent cases of *Green* v. *Louisville & Interurban Railway Co.*, and *Green* v. *Louisville Railway Co.*, decided by the Supreme Court of the United States and reported by 37 Supreme Court Reports, 673, uproot the contention that the act is constitutional, and hold that the State Board of Valuation, and the city assessor and Board of Supervisors, acting independently of each other, and fixing different valuations of the same property, work a discrimination, inimical both to the federal and state constitution. In this, however, appellant is in error. It must be borne in mind that complaint is only made of the assessment. The warehouseman had his remedy, in case of an excessive or unfair valuation, by appearing before the Board of Valuation and Assessment at the time he received notice of the valuation fixed, and there make complaint as provided in Section 4107, Kentucky Statutes. This appellant failed to do but acquiesced in the assessment by paying taxes both to the county and state on the valuation fixed by the State Board. This being true, it can not be heard to complain now."

The contention of the plaintiff in error is answered by the case of *Western Union Telegraph Co.* v. *Missouri*, 190 U. S., 412. In that case the Western Union Telegraph Co., in a proceeding attacking an assessment of its property for purposes of taxation, alleged that the Board of Equalization had practiced discrimination against it by assessing at a value disproportionate to the value assessed on real and personal property by local assessing officers. This court on page 426, quoted from the Supreme Court of Missouri, the following:

> "The defendant can not avail itself of these cases, for the reasons, first, that it seems to raise the question of discrimination by a defense to an action at law to collect the taxes, and thereby collaterally attacks the judgment of the board of equalization; second, that such questions can only be raised by a direct attack, in equity, and then only upon the condition precedent that it pays or tenders the amount justly due and only asks to have the collection of the excess restrained. This the defendant has not done in this case. It simply alleges a discrimination or excessive tax, and then seeks to defeat the whole assessment without paying or tendering anything, notwithstanding it admits by its answer and its proofs that it has property in this State subject to taxation of the value of $541,472.40. Upon the authority of the cases relied on by it, this can not be done."

This court then said:

> "We concur in this view. The proceedings before the board were *quasi* judicial and the order made by it was within its jurisdiction. It was not void on its face, and can not be resisted in an action at law. This is the principle announced in the case referred to. In *Stanley*

v. *Supervisors of Albany*, 121 U. S., 535, is cited, among other cases, *Balfour* v. *City of Portland*, 28 Fed. Rep., 738. The case is especially pertinent. The action was at law for the recovery of taxes paid under protest which had been levied upon property which, it was charged, had been deliberately overvalued. Recovery was denied. The Circuit Court said:

"'The property was subject to taxation by the authority and for the purpose alleged. True, the result reached was erroneous, because of the willful disregard in the proceeding of the law requiring uniformity in the valuation of property for taxation within the jurisdiction of the defendant. Still, the proceeding being *quasi* judicial, and the subject matter within the jurisdiction of the officers who conducted it, the result reached is so far conclusive that the legality of it can not be questioned in an action at law to recover back the one half of the tax as illegal.'

"So this court said in *Stanley* v. *Supervisors*, *supra*:

"'It is only where the assessment is wholly void, or void with respect to separate portions of the property, the amount collected on which is ascertainable, or where the assessment has been set aside as invalid, that an action at law will lie for the taxes paid, or for a portion thereof. Overvaluation of property is not a ground of action at law for the excess of taxes paid beyond what should have been levied upon a just valuation. The courts can not, in such cases, take upon themselves the functions of a revising or equalizing board. *Newman* v. *Supervisors*, 45 N. Y., 676, 687; *National Bank of Chemung* v. *Elmira*, 53 N. Y., 49, 52; *Bruecher* v. *The Village of Portchester*, 101 N. Y., 240, 244; *Lincoln* v. *Worcester*, 8 Cush., 55, 63; *Hicks* v. *Westport*,

130 Massachusetts, 478; *Balfour v. City of Portland*, 28 Fed. Rep., 738.'

"And we think overvaluation of property can not be a ground of defense at law. In other words, the action of the tax officers, being in the nature of a judgment, must be yielded to until set aside. This can only be done in a direct proceeding."

This case seems to answer conclusively all the contentions made or offered by plaintiff in error in this case, since complaint was made only of the assessment in the Court of Appeals.

Other questions were raised and urged for the first time in a petition for rehearing, but it is well settled by the decisions of this Court, that the attempt to raise for the first time a Federal question, in a petition for rehearing after judgment comes too late. *Loeber* v. *Schroeder*, 149 U. S., 580, 585.

Therefore the decision of the Court of Appeals of Kentucky should be affirmed, or the writ of error dismissed.

Respectfully submitted,

A. E. Stricklett,

Attorney for Defendant in Error.

J. A. Donaldson,

G. A. Donaldson,

J. L. Donaldson,

Of Counsel.

NOTICE.

JETT BROS. DISTILLING CO.,
Plaintiff in Error,

vs.

CITY OF CARROLLTON,
Defendant in Error.

The plaintiff in error and its attorneys, Mr. Helm Bruce and Mr. George B. Winslow, will take notice that the foregoing motion to dismiss the writ of error in the above entitled cause will be submitted to the Supreme Court of the United States for a decision of the Court thereon at the October, 1919, term, to be held in the Capitol in the City of Washington, District of Columbia, when the writ of error is called in said case, for argument by that Court.

J. A. Donaldson & Sons,
By A. E. Stricklet,
Attorneys for Defendant in Error.

Carrollton, Kentucky,
November 10, 1919.

To Mr. Helm Bruce, and
Mr. George B. Winslow,
Counsel for Plaintiff in Error.

The above notice accepted, this 12th day of November, 1919.

Helm Bruce,
George B. Winslow,
Attorneys for Plaintiff in Error.

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Supreme Court of the United States

October Term, 1919. No. 108.

JETT BROS. DISTILLING COMPANY,
Plaintiff in Error,

No. 108. *vs.*

CITY OF CARROLLTON,
Defendant in Error.

Supplemental Brief for Defendant in Error.

MOTION TO DISMISS.

Counsel for plaintiff in error has suggested some propositions in his reply brief, which we desire to answer.

The law was enacted and the rules of this court promulgated relative to the manner in which writs of error may be issued, to establish orderly procedure. The proper allowance and issuing of the writ of error is the foundation of the jurisdiction of the Federal Supreme Court over judgments of the State courts. Therefore, in order that the jurisdiction might obtain, it would seem that a petition and formal order allowing the writ of error, are steps necessary to remove the case from the State court to the Federal Supreme Court.

This Court in the case of *Gleason* v. *Florida*, 9 Wall.,

779, 783, had under consideration a motion to dismiss the writ of error, on the ground that it had not been properly allowed. The Court said:

> "But on looking into the record, we find no allowance of the writ. And this has been repeatedly held to be essential to the exercise by this court of revisory jurisdiction over final judgments or decrees by the courts of the States. In the case of *Twitchell* v. *The Commonwealth*, the rule which governs the allowance, by National courts and judges, of writs of error to State courts, was thus stated: 'Writs of error to State courts have never been allowed as of right. It has always been the practice to submit the record of the State court to a judge of this court, whose duty has been to ascertain whether any question cognizable here on appeal was made and decided in the proper court of the State, and whether the case, upon the face of the record, will justify the allowance of the writ.' And this may now be considered as the settled construction of the Judiciary Act on this subject. The foundation of the jurisdiction of this court over the judgments of State courts is the writ of error; and no writ of error to a State court can issue without allowance, either by the proper judge of the State court or by a judge of this court, after examination as just stated."

If, therefore, allowance of the writ of error is essential to the jurisdiction of the Federal Supreme Court over the judgments of the State courts, the question is suggested then, how is the writ of error allowed? In the instant case, the Chief Justice of the Court of Appeals of Kentucky, allowed the writ of error by endorsing thereon the following: "Allowed by W. E. Settle,

Chief Justice Kentucky Court of Appeals." No formal order of the Chief Justice of the Court of Appeals of Kentucky allowing the writ of error seems to have been entered in this case, or at least, none appears in the printed record.

We would not be understood as being ultra-technical in urging the dismissal of the writ of error in this case. The absence of the petition for a writ of error and formal order allowing the same, seems to me to be of sufficient importance to direct the attention of the Court thereto, in order that we might have an expression from the Court upon the question of procedure in this respect. If either the failure to file a petition for writ of error, or the absence of an order formally allowing the writ of error, is fatal to this Court taking jurisdiction of the case, we submit that the writ of error in this case should then be dismissed.

2. It having developed that an agreement had been entered into by counsel who represented the parties to this litigation in the Court of Appeals of Kentucky, by which plaintiff in error was given additional time in which to file petition for rehearing, the writ of error was issued within the time provided by law, and the second ground set forth in the motion to dismiss is now withdrawn.

MERITS.

I.

Counsel for plaintiff in error contends that an assessment for purposes of taxation may be attacked at any time collaterally, or the correctness of the assessment

may be attacked, in a suit for the collection of taxes. This may be done only where the assessment was made by a person unauthorized to make it, or where in the making of the assessment, the provisions of the statute have not been followed; but, where an assessment is made by the proper officers and the provisions of the statutes in reference thereto substantially followed, or the assessment approved in manner provided by law, and no relief obtained within the time provided by statute for correcting it, if erroneous, the assessment becomes final and conclusive, both upon the tax payer and upon the taxing authorities. It is certainly not contemplated, nor is it the law, that a tax payer by merely denying the correctness of the assessment made by the proper officer, could have his assessment reviewed by the courts in a collateral proceeding. If such was the case, the State, the county and the various municipalities, would be seriously handicapped for want of sufficient revenue in the performance of their respective governmental functions. In a case cited by counsel *Henderson Bridge Co.* v. *Comth,* 99 Ky., 623, 645, the Court of Appeals said:

> *"It is not contemplated by the law that every corporation, company or association operating under and enjoying a franchise from the State, should simply by denying the correctness of the valuation placed on its franchise by this board put again the whole thing in issue and have same reheard and readjudicated by the courts. It would be an insufficient system of revenue for the State if the just taxes against every such corporation, company or association could only be collected at the end of a separate law suit against each."* [Emphasis ours.]

So to avoid the ill consequence that would result

from leaving open the correctness of an assessment to collateral attack, the court has held that an assessment made by the proper officers, and substantially in the manner provided by law, and no relief obtained within the time provided by law for correcting their action, if erroneous, becomes final and conclusive. Such in effect were the conclusions of the Court of Appeals in the instant case.

But counsel for plaintiff in error says the reasoning of the Court of Appeals in its opinion in this case "seems * * * very peculiar." The Court in part said:

> "It must be borne in mind that complaint is only made of the assessment. The warehouseman has his remedy in case of an excessive or unfair valuation, by appearing before the Board of Valuation and Assessment at the time he received notice of the valuation fixed and there make complaint as provided in Section 4107 of the Statutes. This appellant failed to do." (178 Ky., 566.)

Having failed to avail itself of the remedy provided by the statute, plaintiff in error can not be heard to complain now. The principle announced in this case has long been the law in the State of Kentucky in reference to assessments made by proper assessing officers.

In the case of *Coulter* v. *Louisville Bridge Co.*, 114 Ky., 42, the facts were substantially as follows: The Louisville Bridge Company filed with the Auditor of Public Accounts the report required by law, upon which the State Board of Valuation and Assessment assessed its franchise for taxation purposes for 1898. This report was submitted to the Board which fixed the valuation of its franchise and notified the Bridge Company as

provided by law. Within thirty days the Bridge Company appeared before the board and protested, and upon a reconsideration, there was entered on the records "No franchise," thereby meaning to find that the valuation placed upon the franchise for the purpose of taxation under the statute was nil. Thereafter the State Board of Valuation and Assessment took up the valuation of the franchise of the Bridge Company and reconsidered the action of the former board, and reassessed the Bridge Company's franchise for the year 1898, notifying the Bridge Company, who instituted an action in equity to enjoin the collection of the tax. The Court of Appeals on page 46 said:

> "The question resolves itself into this: Is there a time where the action of the assessing officer becomes final both to the citizen and the taxing power?"

And answering that question on page 47, the Court said:

> "We are of opinion and hold that when the proper assessing officers, within the time and substantially in the manner prescribed by statute, have acted in considering and fixing the valuation upon property liable to assessment for taxation, and no relief has been obtained within the time allowed by statute for correcting their action, if erroneous, that action is final. The judgment and action of the assessor based upon the legal evidence then obtainable and at hand, and as fixed by statute, when recorded in the proper tax lists, in the very nature of things, should be conclusive upon the State, as well as against the taxpayer."

And again the Court of Appeals of Kentucky in the case of *First National Bank* v. *Hopkinsville,* 128 Ky., 383, reaffirmed the rule announced in the Coulter case cited above. In this case the First National Bank of Hopkinsville instituted an action against the City of Hopkinsville to recover taxes alleged to have been illegally collected by the City of Hopkinsville. The bank claimed that its shares of stock were assessed at $60,087 on which it paid taxes to the city, and at the time the assessment was made it was the owner of $50,000 worth of government bonds in which its capital and surplus was invested, and that state banks were entitled to deduct from the aggregate value of their assets non-taxable securities, it was entitled to the same right. The Court of Appeals, pages 386 and 387, said:

> "This is not a case where the assessment is void. Nor is it a case where a party is assessed upon property he does not own. It is simply a case where the claim is made that the assessment is too high because appellant was not given credit in the assessment fixed for the amount of its government bonds. In order to hold that appellant is entitled to recover we would have to say that the assessment was too high. This we have no power to do after the assessing officers have passed upon the question, and no complaint has been made to them within the time prescribed by law."

The Court then cited and approved the rule in the Coulter case and on page 388, further said:

> "Appellant's property was assessed by the proper officers. The assessment was examined and approved by the boards provided by law. Their action, therefore, is final and conclusive, both upon appellant and appellee. That being

> the case the courts have no jurisdiction to supervise and correct the assessment."

Substantially the same question was before this Court in the case of *Stanley* v. *Supervisors of Albany*, 121 U. S., 535, 549, 550. It was contended that the assessment of shares of stock in a national bank, at a greater rate than was assessed on share of stock in banks organized under the laws of New York and located in the same city, and at a greater rate than was assessed on other money and capital in the hands of individual citizens of the State, was illegal and void, and the money received therefor was wrongfully collected and paid into the county treasury, and it belonged of right to the shareholders. The Court said:

> "Overvaluation of property is not a ground of action at law for the excess of taxes paid beyond what should have been levied upon a just valuation. The courts can not in such cases take upon themselves the function of a revising or equalizing board. (Citing cases) * * *
>
> "When the overvaluation of property has arisen from the adoption of a rule of appraisement which conflicts with a constitutional or statutory direction, and operates unequally not merely on a single individual but on a large class of individuals or corporations, a party aggrieved may resort to a court of equity to restrain the exaction of the excess, upon payment or tender of what is admitted to be due. This was the course pursued and approved in *Cummings* v. *National Bank*, 101 U. S., 153."

The question of the finality of an assessment was again before the Court of Appeals in the case of *Comth.* v. *Southern Pacific Company*, 150 Ky., 97, 108. The Court

again quoting and reaffirming the Coulter case, *supra*, said:

> "When the proper assessing officers, within the time and substantially in the manner prescribed by statute, have acted in considering and fixing the valuation upon property liable to assessment for taxation, and no relief has been obtained within the time allowed by statute for correcting their action, if erroneous, that action is final."

The case of *Illinois Central Ry. Co.* v. *Comth*, 218 U. S., 551, decided by the Court of Appeals of Kentucky (128 Ky., 268), and brought to this court for review on writ of error, involved the right of a taxpayer to have reviewed by the courts an assessment which was made by the State Board of Valuation and Assessment, and which had become final by failure of the taxpayer to appear before the board and seek a reduction of the assessment within the time provided by law. This Court on page 561 quoted from the opinion of the Court of Appeals, the following:

> " '*The Board made the assessment in the way that all other assessments were made. It gave notice of the assessment to the railroad company as required by statute and at the end of thirty days it gave notice, as provided by the statute, that the assessment had become final. When this had been done, the matter passed beyond the control of the board. A final assessment had been had as provided by law, and if any injustice was done the taxpayer, it was due entirely to his failure to appear before the board and ask a reduction of the assessment.* No reliance could be placed in such proceedings if the vadidity of the record was made to depend upon the secret intentions of the assessing officer. The

validity of their actions depends upon what they do and not upon their undisclosed purposes. When the assessment had become final and the Railroad Company owed the State the amount of taxes thus fixed, the assessing officers were without authority afterward to make any agreement with the railroad to the effect that if the railroad would pay the taxes for 1899, they would forego collecting the taxes for the previous years.' [Emphasis ours.]

"And on the petition for rehearing the court added this statement:

"'When the board made an assessment and sent out the preliminary and the final notices as provided by statute that the assessment had been made its action was final and the legal effect of its action must depend on what they did and not on the secret intentions of the Auditor.'"

This Court on page 562, then said:

"This construction of the powers of the state officers under the statutes of the State relating to franchise assessments—this determination with regard to the finality of the assessment in question—does not violate any constitutional right of the plaintiff in error. The assessment was made in accordance with the law of the State; it was, under that law, a final assessment and no ground is shown here for impugning it."

We therefore contend that the assessments of the distilled spirits for the various years in question having been made by the proper assessing Board within the time and substantially in the manner provided by law, are final. Paraphrasing the language of the Court of Appeals of Kentucky approved by this Court in the Illinois Central Railroad Case, *supra*, "if any injustice was done

the plaintiff in error, it was due entirely to its failure to appear before the board and ask a reduction of the assessment. Not only did plaintiff in error fail to appear before the Board and ask for a reduction, but it condoned the action of the Board by paying the State and County taxes due on an assessment that it is now asking this Court to declare illegal and void.

Counsel for plaintiff in error on page 11 of his reply brief, contends that "the Court of Appeals of Kentucky has held in this line of cases that it is necessary for the plaintiff to allege the taking of every step necessary to show that the tax sought to be collected is a valid tax." That at one time was the law, but it is not the law at this time, nor was it the law during any of the years involved in this case. In the case of *Board of Councilmen of City of Frankfort* v. *Morgan,* 110 S. W., 286, 288, the Court of Appeals of Kentucky said:

> "It was formerly the rule in this state that, in actions to recover taxes, the petition must affirmatively set up the existence of every fact necessary to show that all the provisions of the statute authorizing the imposition of the tax were complied with by the assessing officers; but this rule has been changed by the statute, *supra,* as well as by the later decisions of this court (*Alexander* v. *Aud,* 88 S. W., 1103, 28 Ky. Law Rep., 69), the purpose of the statute and decisions being to put upon the taxpayer, when sued to recover taxes, the burden of pointing out the particular defects in the creation, levy, or assessment of the tax that he relies on to defeat its collection."

In the case of *Asher* v. *City of Pineville,* 140 Ky., 670, the Court again had under consideration the sufficiency

of the allegations of a petition wherein a taxpayer was seeking to enjoin the City of Pineville from selling property levied upon by it to pay taxes due said City. On page 673 quoting from the Frankfort case, *supra*, the Court said:

> " 'If a taxpayer desires to resist the collection of the taxes, he must not only point out in his pleading the particular grounds relied on, but he must establish their existence by proof. The city is not required to introduce any evidence until the taxpayer has made out a case that will overcome the legal presumption that the proceedings by the city and the taxing officers are regular * * *. If he fails in this, the city in attempting to enforce the collection of taxes will not be put to the necessity of showing affirmatively that the law was complied with in the levy.'
>
> "After saying that the limitations upon the tax rate contained in the Constitution were mandatory, and could not be exceeded or evaded by the council or other taxing authority, we further said:
>
> " 'But here, again, the taxpayer, who is assailing the tax, must prove the averments of his pleading. The presumption is that the council or authority levying the tax has not exceeded its power; and the taxpayer attacking the validty of the tax upon the ground that it exceeded the constitutional limitation, must point out in his pleading the grounds he relies upon, and sustain his contention by evidence.' "

From the authorities above cited, it will be seen that the rule of pleading is changed, so that instead of the burden being on the taxing power to allege and prove the taking of every necessary step to show the tax sought to be collected is legal, the burden is on the taxpayer re-

sisting the payment of the taxes to allege and prove wherein the right to collect the tax is illegal or void.

II.

Counsel in his original and reply briefs in this case insists that the City of Carrollton levied the tax on which this suit was brought on the 7th and 13th days of July, 1916. The petition in its several paragraphs shows that the city council of the City of Carrollton levied a tax of seventy-five cents on each one hundred dollars of taxable property in the City of Carrollton at the proper time and for each of the years in question. These levies were made each year at the time provided by law, by resolution of the City Council, but the charter provides that the levy of the annual *ad valorem* tax shall be by ordinance. Thus perceiving the error in the proceedings, the city council on July 7th and 13th, 1916, proceeded to correct the irregularities so as to conform to the charter provisions. Therefore, the proceedings of the council on the 7th and 13th days of July, 1916, were for the purpose of amending and correcting what the city council had attempted to do in each of the preceding years from 1907 to 1915, inclusive. This council had the right to do. In the case of *Commonwealth* v. *C. & O. S. W. Ry. Co.*, 141 Ky., 633, the Court of Appeals of Kentucky held that a fiscal court of a county could amend the ordinance levying a tax eleven years after it attempted originally to levy a tax so as to conform to the law.

In that case on pages 637 and 638, the Court of Appeals said:

> "If the fiscal court had failed altogether—had not attempted, let us say—to levy a tax for

1896, it was nevertheless competent for it to levy it subsequently, for until its power was exhausted it might be exercised. The rights of the parties would however be fixed as of the date of the levy, not as of the time when it might have been first levied. *But where the attempt had been made to levy the tax, the ordinance fixing the amount duly passed, and the assessment of all property liable to the tax had been regularly made, it was competent for the fiscal court to cure a defect in its proceedings so as to make them conform to law, as it would have been to correct any other mistake in any other point of the assessment proceedings so as to make valid that which had been lawfully attempted.* * * * A tax would be void only when there is lack of power to levy it. In every other particular the proceedings, however informal, may be cured and perfected so as to comply with the law. It would be a strange, as well as destructive rule of law, that would make it impossible to cure errors in procedure of form in taxing matters, making it thereby possible for ignorant or designing officials to stop the government by failing to strictly follow in correct time and manner the prescribed procedure in assessments." [Emphasis ours.]

The levy of the tax as amended by the Council of the City of Carrollton is not before this Court for consideration. The plaintiff in error for the first time, attempted in its petition for rehearing, to raise a federal question in connection with the application of the statutes of limitation of Kentucky (Record, page 135).

The only Federal question distinctly raised in the court of original jurisdiction by plaintiff in error was the alleged discrimination of the valuation of its property for purposes of taxation. And this was the only question of

a Federal character passed upon or decided by the Court of Appeals. This Court will consider only the Federal questions properly raised in the trial court and decided by the Court of Appeals. This seems to be the established rule.

The rule contended for here was stated by this Court in *Chappell* v. *Bradshaw,* 128 U. S., 132, 133, where the Court said:

> "To give this court jurisdiction to review the judgment of a state court under Sec. 709 of the Revised Statutes, because of the denial by a state court of any title, right, privilege, or immunity claimed under the Constitution of any treaty or statute of the United States, it must appear on the record that such title, right, privilege, or immunity was 'specially set up or claimed' at the proper time in the proper way. 'To be reviewable here,' says Waite, C. J., in *Spies* v. *Illinois,* 123 U. S., 131, 181, 'the decision must be against the right so set up or claimed. As the Supreme Court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the Supreme Court was only authorized to review the judgment for errors committed there, and we can do no more.' Tested by this well settled rule it is apparent that this writ of error can not be maintained, as it is conceded that the plaintiff in error did not set up or claim in the trial court the limitation, the benefit of which he now insists should have been accorded him."

We may add that the jurisdiction of the Court of Appeals in a case of this kind is to review only the judgment of the court of original jurisdiction. This Court also in the case of *Loeber* v. *Schroeder,* cited in our original brief, 149 U. S., 574, 585, said:

"It is also well settled by the decisions of this court that the attempt to raise for the first time a Federal question, in a petition for rehearing, after judgment, comes too late. *Texas and Pacific Railway Co.* v. *Southern Pacific Railroad Co.*, 137 U. S., 48, 54; *Butler* v. *Gage*, 138 U. S., 52; *Winona & St. Peter Railroad* v. *Plainview*, 143 U. S., 371; *Leeper* v. *Texas*, 134 U. S., 462; and *Bushnell et al* v. *Crooke Mining and Smelting Co.*, 148 U. S., 682."

We therefore submit that under the decisions of this Court there is but one question of a Federal character properly before it, namely, the alleged discrimination in respect to the assessment of the distilled spirits on which the tax is sought to be collected in this proceeding. But under the assessment statutes as construed by the Court of Appeals of Kentucky, which this Court recognizes and accepts as "the authoratative declaration of what the law is," *Burgess* v. *Seligman*, 107 U. S., 20, 33, the assessment in question was final and the court has no jurisdiction to supervise or correct it. (*First National Bank* v. *Hopkinsville, supra.*)

We therefore submit that the decision of the Court of Appeals of Kentucky should be affirmed or the writ of error dismissed, all of which is

Respectfully submitted,

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